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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-204694

DATE: March 24, 1982

MATTER OF: Patterson Pump Company

DIGEST:

1. Contracting officer essentially was making a subjective judgment, and not applying a definitive criterion of responsibility, in determining whether bidder met requirements of solicitation's qualifications clause and had sufficiently thorough experience to perform work under contract. This is the type of affirmative determination of responsibility which as a matter of policy GAO does not review.
2. Whether bidder submitted false information concerning its experience is a matter of agency's responsibility determination and affirmative determination is not reviewed by GAO absent evidence of fraud by procuring officials or other circumstances not applicable here. However, mere allegation of fraud, without more, is not sufficient to justify review under Bid Protest Procedures.
3. Assuming agency should not have made award while protest was pending, legality of award would not be affected.

Patterson Pump Company protests the award of a contract by the Army Corps of Engineers to R-B Pump Company under invitation for bids (IFB) No. DACW64-81-B-0046. For the reasons discussed below, we dismiss the protest.

The solicitation was issued on March 30, 1981 for pumping units and related machinery and contained a "Qualifications" clause requiring each bidder to provide certain information about its experience. Patterson

asserts that R-B's bid is "nonresponsive" and that the firm is not responsible because its president misrepresented his qualifications as having designed, tested, and supplied pumps to different Corps of Engineers districts. In addition, according to Patterson, R-B does not have trained personnel, adequate equipment or financial resources to perform the work under the contract. Finally, Patterson alternatively maintains that definitive responsibility criteria were fraudulently misapplied by the contracting agency in not acting on data provided by Patterson to show the falsity of information contained in R-B's bid.

Although Patterson first characterizes the matter as relating to the "responsiveness" of other firm's bid, the allegations actually relate to the firm's responsibility. Responsiveness concerns the promise of a bidder to perform in accordance with the invitation; a bid is "responsive" if, as submitted, it is an offer to perform the exact thing called for in the solicitation. See John Grace & Co., Inc., B-190439, February 15, 1978, 78-1 CPD 131. There is no evidence that the other bidder took exception to the solicitation requirements and therefore we have no basis for viewing the bid as nonresponsive. Rather, the qualifications and experience of bidders and offerors and their ability to perform a particular contract are matters of responsibility. Our Office does not review affirmative determinations of responsibility unless there is a showing of fraud on the part of the Government or that the Government failed to apply definitive responsibility criteria. Colorado Research and Prediction Laboratory, Inc., B-199755, March 5, 1981, 81-1 CPD 170. Patterson suggests that both of those circumstances are present here.

With regard to Patterson's allegation that definitive responsibility criteria were misapplied, the solicitation clause in question states as follows:

"QUALIFICATIONS. Each bidder shall state in his bid whether he is now or ever has been engaged on any contract or other work similar to that proposed, giving the location and rating of the equipment and the year in which it was manufactured or installed. He shall also submit such other information as will tend to show his ability to prosecute vigorously the work required by these specifications. Previous manufacturing experience and present manufacturing and testing facilities will be considered in determining whether the bidder is qualified to perform the work. A prospective contractor must have the necessary capital and experience, and own, control by firm option, or be able to procure the necessary plant to commence the work at the time prescribed in the specifications and thereafter to prosecute and complete the work within the time specified; and he must not be already obligated for the performance of other work which would delay the commencement, or completion of the work contemplated under this solicitation."

The contracting officer states that he awarded the contract to R-B after reviewing the firm's credentials and qualifications which he found met the requirements of the "Qualifications" clause.

We do not agree that definitive responsibility criteria were misapplied. We view the clause merely as a request for information to aid the contracting officer in his determination of the low bidder's responsibility.

By way of background, in 1974, we observed that the determination of whether a bidder was a responsible prospective contractor essentially involved a matter of business judgment which is not readily susceptible to reasoned review. Because the burden upon the protester of showing that the contracting officer acted arbitrarily was so high, we concluded that no significant purpose would be served by our continued review of contracting officers' affirmative determinations of responsibility, absent actions by procuring officials which were tantamount to fraud. Central

Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Shortly thereafter, however, we also stated that where there was a question of whether a bidder met certain specific, objective or definitive guidelines or requirements, we would review the affirmative determination of responsibility to determine if it was founded on a reasonable basis. Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376.

The import of the cases is that we will not review the contracting officer's determination that R-B was responsible if the contracting officer essentially was making a subjective judgment. On the other hand, if the "Qualifications" clause imposed some specific, definitive criterion of responsibility, we would examine the record to see if R-B had submitted evidence which would support a finding that it met the criterion.

While the solicitation required submission of data by each bidder showing its qualifications, it did not establish a definitive criterion of bidder responsibility. Rather, it left the relative quality of the qualifications indicated by the data for evaluation by the contracting officer who, as part of his consideration of whether R-B was a responsible prospective contractor, had to form a judgment as to whether the firm's experience was sufficient to properly perform the work. We think that is the type of judgmental decision which as a matter of policy we stopped reviewing in 1974. Therefore, we will not review the contracting officer's affirmative determination of R-B's responsibility. See Central Washington University, B-200316, August 18, 1981, 81-2 CPD 152.

Next, the protester alleges inaction on the part of Government officials which is tantamount to fraud. R-B's bid contained the following: "He [the president of R-B] designed, tested and supplied the following jobs." There followed a listing of various jobs indicating that person's experience. As disclosed in R-B's "Qualifications" statement, its president had been chief engineer for Patterson for six years before leaving Patterson and forming R-B. Patterson claims that the duties of the president of R-B, while he was employed at Patterson, were limited to "testing the above referenced pumps" and did not involve the design, manufacture or supply of the item. Therefore, Patterson alleges, the statements about his previous experience were "false."

The Corps has conducted two preaward surveys of R-B and is satisfied that the firm is a capable prospective contractor. The Corps explains that most pump jobs involve the adaptation and modification of previous designs to obtain the exact performance characteristics specified, and that this work legitimately can be called "design" work. In the Corps' view, it reasonably can be assumed that if R-B's president was chief engineer with Patterson for almost six years, he probably acquired considerable knowledge in various phases of pump design, testing and manufacture. The qualification information submitted by R-B Pump Company was therefore considered to be reasonably accurate and in conformance with the "Qualifications" clause.

We believe the record shows at most a difference of opinion as to the kind and quality of experience possessed by R-B's president. Our Office has no way of determining whether the qualifications of the individual were accurately represented. It is not our practice to conduct investigations under our Bid Protest Procedures for the purpose of establishing the validity of a protester's speculative statements. Peter Rosen Productions, Inc., B-192481, September 28, 1978, 78-2 CPD 243. Here, the contracting officer, as a matter of subjective judgment, has made a good faith determination that the qualifications of the president of R-B met the requirements of the "Qualifications" clause. We have no basis to question or review this determination on the grounds of fraud since the record is completely devoid, except for mere allegation, of evidence regarding fraud on the part of procuring officials. See Mars Signal Light Company, B-193942, March 7, 1979, 79-1 CPD 164. Consequently, the matter is simply an affirmative determination of responsibility and does not involve issues appropriate for our review on the merits.

Patterson's other allegations that R.B. lacks the trained personnel, equipment and financial resources to perform the contract generally question that bidder's responsibility, and are not for our review under the standards set forth in Central Metal Products, Data Test and Yardney Electric, supra.

Finally, Patterson objects to an award allegedly being made after its protest was pending in our Office. In this regard, we note the protester did not furnish to the contracting officer a copy of its initial protest to our Office and that award was made before the Corps was notified that a protest had been filed. Even if it is assumed that the agency made award to R-B while the Patterson protest was pending, the legality of the award would not be affected. SAI Comsystems Corporation, B-196163, February 6, 1980, 80-1 CPD 100.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel